

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-731

January 27, 2003

OFFICE OF THE PUBLIC ADVOCATE
Request for Commission Investigation Into
Whether CMP Ratepayers are Entitled to a
Portion of the Proceeds From Property Leased
In Dead River Township

STAFF RECOMMENDATION

NOTE: This document contains the recommendation of the Commission Staff. Even though it is in the form of a Commission order, it does not constitute action by the Commission. Interested persons may file responses or exceptions to this Recommendation on or before **February 14, 2003**. It is expected that the Commission will consider this recommendation at its Deliberative Session on March 3, 2003.

I. SUMMARY

On November 26, 2002, the Public Advocate filed a request that the Commission open an investigation pursuant to 35-A M.R.S.A. § 1303 of a real estate transaction involving land owned and leased by Central Maine Power Company (CMP) in Dead River Township, Maine. We decline to investigate this matter further as there is no legal basis for requiring property acquired by eminent domain or threat of eminent domain in the 1940's, to be limited to the use to which it was originally taken or purchased.

II. PROCEDURAL BACKGROUND

The Commission asked CMP to respond to OPA's request on December 4, 2002. CMP responded on December 18, 2002 opposing the opening of an investigation. A number of other entities filed comments in favor of the Public Advocate's request.

These included Robert Weingarten, Natural Resources Council of Maine, Barbara Workmen, and the Friends of Bigelow and the Northern Appalachian Restoration Project. Western Maine Foundation and Mr. and Mrs. David Guernsey filed comments requesting that the Commission decline opening an investigation. Mr. Duluth Wing filed a letter concerning the views of property owners in the Flagstaff area in the 1940's.

II. FACTUAL BACKGROUND

In April 2002, CMP leased 29 acres of land in Dead River Township to Western Mountain Foundation (Western). Western subsequently filed an application with Maine's Land Use Regulation Commission for approval to build a sporting camp on the 29-acre parcel. The parcel is part of the land that CMP and its predecessor-in-title acquired in the 1940's to build a dam, which became known as the Long Falls Dam, and operate a reservoir and storage basin, which became known as Flagstaff Lake, to insure a continuous head of water to operate downstream hydroelectric generating stations. In 1999, CMP sold Long Falls Dam, and all other assets that are associated with a Federal Energy Regulatory Commission hydro license known as the Flagstaff Project, to FPL Energy Maine Hydro LLC. The "project boundary" for the dam is the 1150-foot elevation mark. CMP retained lands above the 1150-foot mark at the east end of Flagstaff Lake, including the 29-acre parcel leased to Western.

CMP purchased the property now in dispute, as reflected in the deeds attached to OPA's request (See OPA Request, Appendix at 32-41). As noted by CMP, the

purchase was from four sophisticated sellers, Guy Gannett, a bank and two trusts.

There is no evidence that CMP took the property by eminent domain, although it seems likely that negotiation over the various properties that made up the entire project would have included the fact that CMP had the authority to take the property if a sale did not occur.¹

III. PUBLIC ADVOCATE'S REQUEST

The Public Advocate argues that because CMP acquired the 29-acre parcel explicitly or implicitly by eminent domain, the Commission should decide that CMP may use the land only for the public purpose for which it acquired the land, or at least for a public purpose. The Public Advocate asserts that the operation of a sporting camp is not a public purpose, and asks the Commission to find that CMP must put the land to a public purpose. To conclude the matter, the Public Advocate asks the Commission to refer the matter to the Attorney General to confirm the Commission's decision in court or to the Legislature so that it may determine the proper public use for the land at this point. Lastly, the Public Advocate asks that, if CMP is allowed to lease the parcel to Western, the Commission investigate whether any portion of the lease revenue should be reflected in determining CMP's ratemaking revenue requirement.

¹ One of the commenters who lived in the area until 1950, recalls that most property owners sold their property with the understanding that this was preferable to the property being taken through eminent domain proceeding. See letter from Duluth Wing (Jan. 7, 2003).

IV. DISCUSSION AND DECISION

A. Required Use For a Public Purpose

After reviewing Maine law, we find neither statute nor common law has placed restrictions on a property's use based on the fact that it was acquired under a "threat" of eminent domain. Even if we assume that the property was taken by eminent domain, Maine common law and case law do not require that the property be forever imbued with the public use for which it was originally taken.

The Law Court recently addressed a situation where a municipality had taken property for a public use (fire station) and then decided 15 years later not to use the property for that purpose and to instead sell it. The original owner sought to purchase it at the amount the City originally paid for it. *South Portland Associates v. City of South Portland*, 2000 ME 29, 746 A.2d 365. The statutory provision under which the City took the property provided in part that "land taken for the purposes described shall not be used for purposes other than those for which it was originally taken." *Id.* at ¶ 5. The original owner argued that this language created a statutory right to reconveyance of the property to the original owner, if the City was not going to use it for the purpose for which it was originally taken.

The Law Court disagreed finding that any statute modifying the general rule would have to be clearly stated. It described the general rule recognized by many jurisdictions as:

when land has been acquired in fee simple absolute by eminent domain, the former landowner retains no rights in the land, and the public use may be abandoned or the land may be devoted to a different use, without any impairment of the estate acquired or reversion to the former owner.

Id. ¶ 4, 746 A.2d at 367, citing 3 *Julius L. Sackman et al., Nichols on Eminent Domain* § 9.07(7)(f) (3rd ed. 1999); see also, e.g., *Mainer v. Canal Auth. of State*, 467 So. 2d 989, 991 (Fla. 1985); *Board of Educ. Of Unified Sch. Dist. 512 v. Vic Regnier Builders, Inc.*, 648 P.2d 1143, 1147 (Kan. 1982). The Law Court held that because the Legislature had not included a clear process for repurchase in the statute, the Court would not infer one. *Id.* at ¶ 10, 746 A.2d at 368.

In 2001, the Legislature enacted legislation apparently in response to this decision. See 1 M.R.S.A. § 815. The new statute creates a right of first refusal for a condemnee, if the entity taking property does not use it for the purpose for which it was taken within eight years. Therefore, for the first time the Legislature created a reversionary interest in property taken by eminent domain if not used for original purposes. However, if the condemnee does not exercise this right, the property is not forever held to be only available for a public purpose. Instead the statute allows, after proper notice to condemnees or heirs, the entity “to dispose of the property in any manner allowed by law. . . .” 1 M.R.S.A. § 815(2)(B).

The Legislature could have placed restrictions on the use or sale requiring that it be used for some other public purpose, but it did not. The Commission has no authority to impose such a requirement nor does there appear to be any precedent whereby a Maine court could impose such a mandate either in the situation where property was taken for a public purpose or under a threat of eminent domain. Given this lack of authority, we do not reach the question of whether CMP's lease to WMF is a public use.

B. Treatment of Proceeds

The Public Advocate also requests that if CMP is allowed to lease the parcel to Western that the Commission investigate whether any portion of the lease revenues should be reflected in CMP's rates. CMP responded that its shareholders are entitled to the proceeds under CMP's current ARP (CMP Response at 11). We conclude that we need not make this determination at this time but instead reserve this issue for CMP's next ARP annual review proceeding or stranded cost rate proceeding.

Respectfully submitted,

Joanne Steneck
Presiding Officer